Since it is abundantly clear that the whole of these proceedings have become necessary by reason of the defendant failing to declare from the very outset the existence of this lease, I order that the plaintiffs' costs of this application be taxed and paid by the defendant.

Application dismissed.

Solicitors: *Hogan, Adams & Allan; M. Abraham.*

LIM LIAN HOE v. TAN MENG SAN

[O.C.J. (Ong J.) May 31, 1961]

[K.L. — Civil Suit No. 8 of 1960]

Practice and Procedure — Prohibitory order under R.S.C. O.43 r.2(1) — Extension of O.43 r.2(7) — Amendment of Statement of Claim and Judgment — The "slip rule" — Judgment under O.13 r.3.

The plaintiff on February 5, 1960 obtained judgment in default of appearance against the defendant personally. On February 12, 1960 a prohibitory order was issued against the defendant in respect of the whole land held under C.T. 4135 which was in the name of the defendant "as representative." On December 2, 1960 the judgment-creditor obtained an order that (1) the Statement of Claim and the interlocutory judgment dated February 5, 1960 be amended by adding the words "executor and representative of" — immediately after the name of the defendant; (2) the defendant be restrained from transferring and changing the land held under C.T. 4135 for 6 month. On May 13, 1961, the plaintiff applied for an extension of the prohibitory order.

Held: (1) the judgment creditor cannot make the estate of the deceased liable on contracts entered into by the representative;

(2) when a judgment drawn up gives effect, and no more than effect, to the intention of the Court, it cannot be corrected under r.11 or r.12 of O.28;

(3) the amendment seeks to alter the very judgment itself, from one *de bonis propriis* to one *de bonis testatoris*, and must therefore be disallowed;

(4) the first prohibitory order issued on February 12, 1960 had lapsed after 6 months, and no special circumstances justify the extension of that order.

Cases referred to:—

(1) *Farhall* v. *Farhall* L.R. 7 Ch. App. 123.

(2) *In re Morgan, Pillgrem* v. *Pillgrem* L.R. (1881) 18 Ch. D. 93.

(3) *MacCarthy* v. *Agard* [1933] 2 K.B. 417.

(4) *Pearlman (Veneers) S.A. Pty. Ltd.* v. *Bernhard Bartels* [1954] 1 W.L.R. 1457.

(5) *Savena Supramaniam Pillay* v. *Tan Kah Chiat* [1934] M.L.J. 133.

APPLICATION.

K. L. Devaser for the plaintiff.

Defendant in person.

Cur. Adv Vult.

Ong J.: This is an application by summons-in-chambers on the part of the judgment creditor asking for a prohibitory order in respect of approximately 102 acres of land held under C.T. No. 4135, for Lot No. 1791, situate in the Mukim of Ampangan, in the District of Seremban, and registered in the name of the judgment-debtor "as representative." What purported to be an original application for a prohibitory order under R.S.C. Order 43, rule 2(1) proved to be in fact an application for an extension of an earlier prohibitory order issued on December 5, 1960. The affidavit of the judgment-creditor filed in support of his application not only failed to show any "special circumstances" to "render an extension just" — as provided under Order 43 rule 2(5) — but was in other respects so unsatisfactory as to lead me to peruse the whole of the file in this action, with disquieting results.

By a Specially Indorsed Writ indorsed with a statement of claim, and filed on January 13, 1960, the plaintiff claimed the sum of $9,000, being refund of part payment of the purchase price of a 26-acre portion of C.T. 4135 agreed to be sold to him by the defendant, and damages for breach of contract. The defendant entered no appearance, but by his defence, filed on January 21, 1960, admitted his own personal liability. Judgment in default of appearance was duly entered against the defendant on February 5, 1960, under Order 13 rule 3. On the application of the judgment-creditor for seizure in execution, the Senior Assistant Registrar issued a prohibitory order on February 12, 1960 against the defendant in respect of the whole land held under C.T. 4135. For some extraneous reason, which is not clear from inspection of the file, no sale took place, and the matter remained in *status quo* until the judgment-creditor retained Mr. K. L. Devaser as his advocate and solicitor on September 12, 1960. On October 5, 1960 he filed a summons-in-chambers (Encl. 15) in terms identical with the one dated May 13, 1961 (Encl. 24) now before me. The affidavit in support took no account of the provisions of Order 43 rule 2(7). On December 2, 1960 the judgment-creditor, through his solicitor, filed a further summons-in-chambers (Encl. 18) applying for:

(1) an order that leave be granted to the plaintiff to amend the Statement of Claim indorsed on the Writ of Summons issued herein in the manner as shown in red ink in the Amended Statement of Claim marked Exhibit "A2" and attached to the plaintiff's affidavit affirmed on the 13th day of August, 1960 and filed herein in support of this application; and as a consequential order the *interlocutory* judgment dated the 5th February, 1960 be amended by adding the words "executor and representative of Lim Ah Hong (f) deceased" immediately after the name Tan Meng San the defendant herein.

(2) a prohibitory order against the defendant/respondent prohibiting and restraining him from transferring and charging the land comprised in Certificate of Title No. 4135 Lot 1791 mukim of Ampangan in the District of Seremban in area 102 acres 0 rood 30 poles subject to caveats and prohibitory orders for a period of six months from the date of the Order.

I do not understand how a judgment under Order 13 rule 3 can be described as an interlocutory judgment. However, on December 20, 1960 Mr. Devaser obtained from the Judge an order in terms. He now asks for an extension of the prohibitory order for a further six months.

When Mr. Devaser appeared before me in Chambers I informed him that he could not expect me to make the order as prayed or any other order; but, since he was insistent that he had ample authority to cite in support of his contention, I adjourned the further hearing into

Open Court today so that he may have the amplest opportunity to do so.

Having heard him, I shall now dismiss the application for the reasons which I now proceed to state.

In the first place, the judgment-creditor cannot make the estate of the deceased liable on contracts entered into by the representative. In *Farhall* v. *Farhall* [1] the principle is so clearly enunciated as to leave no room for any argument. There Sir W. M. James L.J. said:

"In this case it seems to me quite clear that there was no legal debt due from the estate to the bank. The executrix borrows money as executrix, says that she is executrix, and the bank debit her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent. The executor has the power to realise the personal estate and to pledge specific assets, which is one mode of realising them. Here the executor has also power to pledge the realty; and I have myself, by a former order, given the bankers the full benefit of the charge they had on part of the real estate, and held them not answerable for any devastavit the executrix committed as to the moneys raised by that mortgage. But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate, is a position supported by no authority and no principle. The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate."

Here the contract in writing which was exhibited to the Statement of Claim was clearly a contract entered into by the judgment-debtor in his own personal capacity as vendor. Were he contracting even in his representative capacity, pursuant to directions given by the testator to carry on business, the liability of the representative is still the same. As Fry J. said in *In re Morgan, Pillgrem* v. *Pillgrem*: [2]

"It appears to me that the principles which regulate questions of this sort are very clear. As I understand them, where a trustee or executor carries on a business under the directions contained in the will of the testator, and in that character contracts a debt, the debt is one for which an action must be brought against the executor personally, and for which judgment must be obtained *de bonis propriis* of the executor, and no action can be successfully brought against the executor as executor, and no execution can be had *de bonis testatoris*, for this very simple reason, that the debt was not the debt of the testator. In making these observations I say nothing about the right which the executor undoubtedly has to come against the assets of the testator."

In the second place, Mr. Devaser contended that the amendment was not made under the "slip rule" Order 28, rule 11, but under rule 12. I think it is a complete fallacy to suggest that when a judgment drawn up gives effect, and no more than effect, to the intention of the Court, it can nevertheless be corrected under rule 11 or 12: See *MacCarthy* v. *Agard*: [3] Commenting on that case in *Pearlman (Veneers) S.A. Pty. Ltd.* v. *Bernhard Bartels*, [4] Hodson L.J. said:

"I agree . . . with the careful judgment of Slade J., and with his analysis of what happened in *MacCarthy* v. *Agard* to which reference has been made. There is, in my view, no question of altering the judgment itself, which could not be done either under the slip rule or under the general power to amend contained in R.S.C., Ord. 28 rule 12, which provides: The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

There the Court allowed an amendment which did no more than correct a misnomer, but in no way affected the substantive judgment.

In the present case the judgment-creditor seeks not only to amend by adding the description of the defendant but also, under the cloak thereof, to alter the very judgment itself, from one *de bonis propriis* to one *de bonis testatoris* and thereby alter the operative and substantive part of the judgment. In expressing my own views as to the impropriety of the order which Mr. Devaser had obtained on December 5, 1960, I should make it clear that I am not pretending to rehear any application concerning that order. I would respectfully agree with the Singapore Court of Appeal in *Savena Supramaniam Pillay v. Tan Kah Chiat, Administrator of Tan Kong Leang, deceased,* [5] that the amendment was made without jurisdiction and must be disregarded.

Lastly, even if this application did not suffer from the fatal defects I have mentioned above, I should nevertheless reject it because the first prohibitory order issued on February 12. 1960 had lapsed after six months, and under Order 43, rule 2(7) it is provided that:

"When a judgment-creditor has obtained in any suit or proceeding a prohibitory order, in execution of an order or judgment in such suit or proceeding, affecting any immovable property or registered interest therein, no further prohibitory order affecting the same property or interest shall be made in the same suit or proceeding in execution of the same order or judgment on the application of such judgment-creditor or of any other person unless the Court or a Judge shall by order otherwise direct, on the ground of the existence of special circumstances."

No special circumstances have been disclosed.

For these reasons I would dismiss the application.

Application dismissed.

SHANMUGAM PILLAI v. PANJALI

[A.C.J. (Ismail Khan J.) June 8, 1961]

[Seremban — Civil Appeal No. 3 of 1961]

Practice and Procedure — Stay of execution pending appeal — Refusal by President of Sessions Court — Appeal against order — R.S.C., O.59, r.12, O.70 r.1.

Where a subordinate Court has refused an application for a stay of execution pending appeal, an appeal against that refusal is not authorised by any rule of procedure and is therefore an illegality which is not cured by O.70 r.1. The proper procedure is an application to the High Court for a stay of execution under O.59 r.12.

Cases referred to:—

(1) *Cropper* v. *Smith* (1883) 24 Ch. D. 305.

(2) *Smurthwaite* v. *Hannay*, [1894] A.C. 494.

CIVIL APPEAL.

Edgar Joseph Jr. for the appellant.

V. C. George for the respondent.